IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 470 of 2006

Bajaj Auto Limited. ... Petitioner.

V/s.

Shri Shrikant Vinayak Yogi
and others. ... Respondents.

J.P.Cama, senior counsel with Ms.Swati Deshpande i/b. M/s.M.S.Bodhanwalla & Co. for the petitioner.

S.K.Talsania, senior counsel with S.R.Nargolkar for respondent Nos.1, 13, 41 and 43.

CORAM : V.C.DAGA, J.

DATED : 13th April 2006.

JUDGMENT :

. Rule, returnable forthwith by consent of parties.

. Heard rival parties.

. Perused petition and documents annexed thereto.

2. This petition is directed against the interim order dated 23rd December, 2005 passed below Exh.U-2 in Complaint (ULP) No.431 of 2005 by the Industrial Court, Pune, whereby application

for interim relief came to be allowed. The petitioner- employer is directed not to give effect to the transfer orders dated 12th December, 2005 issued to the respondents- workmen till final disposal of the complaint.

The Factual Matrix :

3. The factual matrix reveals that the transfer orders issued to the respondents- workmen transferring them to various depots and dealers all over India are the bed-rock of Complaint (ULP) No.431/2005 alleging unfair labour practices on the part of the petitioner- employer.

4. At this juncture, it is necessary to refer to the background facts leading to the impugned transfer orders and nature thereof.

5. Writ Petition Nos.110/1998 and 6608/1999 raising industrial disputes between the parties are pending in this Court. When the said petitions came up for hearing, the petitioner-employer instead of arguing these petitions finally; sought adjournment making statement across the bar that the Supreme Court is already ceased of the issues raised in the petitions, as such petitioner- employer expressed its desire to

file transfer application within a period of six weeks so as to get the petitions transferred to the Supreme Court. The learned single Judge, who was hearing these matters, reluctantly granted adjournment imposing heavy costs, however, subject to the petitioner- employer furnishing an undertaking that the respondents- workmen involved in the petitions would be given payments and other facilities; with effect from 1st January, 2003; as are being given to the other permanent employees. The petitioner- employer agreed to this suggestion given by the Court. Orders in this behalf were issued on 7th January, 2003. That is how, as on date, the respondents are getting all the benefits which the permanent employees of the petitioner- Company are enjoying. However, in spite of getting aforesaid two petitions adjourned at the time of final hearing with a view to get the petitions transferred to the Apex Court, the petitioner- employer did not obtain any effective orders from the Apex Court for the reasons best known to them.

6. During pendency of the aforesaid petitions, the petitioner taking advantage of its

own undertaking filed in Writ Petition No. 1110/1998 vide interim order dated 19th December 2002 issued transfer orders, specifically, mentioning therein that the Supreme Court vide its order dated 11th September, 2003 has recognised the right of the petitioner- employer to transfer its workmen throughout the country to the various depots, suppliers or dealers of the petitioner. That is how respondents herein were transferred to the various destinations in the country. One of such specimen transfer orders issued in favour of one Shri Prakash K Udare, resident of Wakad, Pune directing him to report at M/s.Vedant Automotives Pvt.Ltd., Howrah (West Bengal) is placed on record. Similar transfer orders are issued to various other respondents directing them to report at various destinations in the different parts of the country.

7. The respondents being aggrieved by the aforesaid transfer orders filed Complaint (ULP) No.431/2005 before the Industrial Court at Pune alleging unfair labour practices on the part of the petitioner- employer under section 28(1) read with Items 3, 9 and 10 of Schedule-IV of the

Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 ("MRTU & PULP Act" for short).

8. In the aforesaid complaint, application for interim relief was moved, specifically, alleging therein that there is no rule of the Company to transfer its employees like complainants (respondents herein) to other dealers, suppliers and/or distributors and/or to their branches, godowns, depots etc.

9. It is further alleged in the complaint that the mutual settlement of dispute, if any, arrived at before the Supreme Court in the matter of the petitioner- Company and R.P.Sawant & Ors. is binding only on those workmen who are parties to the compromise. That it cannot be made applicable to the complainants since they are not parties to the said compromise. That the employer cannot assume power to transfer its employees taking advantage of the said compromise.

10. It is further pleaded in the complaint that since the year 2004, the petitioner- employer

has started recruiting workers through the contractors for doing shop floor work. Based on this contention, it was sought to be pleaded that the contention of the petitioner that there is no work available in the petitioner-company for these complainants/ respondents- workmen is totally false.

11. It is further averred in the complaint that the orders of transfer are malafide. The same are issued in the colourable exercise of employer's right in the guise of following policy of the management when no such policy exists. The affidavit in support of the complaint was filed.

12. On being noticed, the petitioner- employer (respondent therein) appeared and filed its reply contending that no work is available with the petitioner-company to keep the complainants-workmen engaged as such in order to employ them and to provide them work they were transferred out of Maharashtra to various destinations to work with various dealers of the petitioner- company. Reliance was also placed on the compromise arrived at with some workers in one of the litigations,

which was pending in the Supreme Court, to justify the orders of transfer.

13. The Industrial Court, Pune after having herad the parties to the complaint, vide its impugned order dated 23rd December, 2005, was pleased to allow the application for interim relief directing the petitioner- employer not to give effect to the transfer orders dated 12th December, 2005 till final disposal of the complaint. This order is a subject matter of challenge in this petition filed under Article 226 of the Constitution of India.

Rival Submissions:

14. Mr.Cama, learned senior counsel appearing for the petitioner contends that the transfer orders are issued in good faith. There is absolutely no evidence on record to suggest or prove any malafides against the employer. He relied upon spate of litigations between the parties to justify the transfer orders. He tried to impress upon this Court that there is absolutely no work available for the present respondents. Consequently, it has become

necessary for the petitioner- employer to transfer them out of Maharashtra to various destinations spread over entire country with a view to provide them work.

15. Mr.Cama further submits that transfer is an incident of service; even if an employee happens to be a temporary employee he can be transferred. According to him, since temporary employees have been given benefits enjoyed by the permanent employees, it would be reasonable to infer that their services are transferable. He, in support of his submissions, relied upon number of judgments of the Apex Court as well this Court viz.; **Mgmt. of Addisons Paints & Chemicals Ltd. v. Workmen**, 2001 1 CLR 587; **Syndicate Bank Ltd. v. Its Workmen**, 1966 II LLJ SC 440; **Barelly Electricity Supply Co. v. Sirajuddin and others**, 1960 I LLJ 556; **Pearlite Liners (P) Ltd. v. Manorama Sirsi**, (2004) 3 SCC 172; **National Hydroelectric Power Corpn.Ltd. v. Shri Bhagwan**, (2001) 8 SCC 574; as well as of this Court, viz., **Raja Bahadur Motilal Poona Mills Ltd. v. Girni Kamgar Sanghatana**, 1985 I CLR 188; **Shivaji A. More v. Estate Manager, M.S.F.Corpn.Ltd.**, 1996

(72) FLR 447; **Executive Engg. Mechanical Divn v. S.D.Deshmukh**, 1997 I CLR 68 and **Press Trust of India Ltd. v. Press Trust of India Ltd.**, 1998 II CLR 1159.

16. Mr.Cama, lastly prayed for setting aside the impugned order so as to enable the petitioner-employer to act upon the transfer orders.

17. Per contra, Mr.Talsania, learned senior counsel appearing for the respondents submits that the impugned orders of transfer are malafide. The intention of the management is to victimise the respondents- workmen. That the respondents-workmen are not occupying any post which is transferable either to the various depots or dealers. That, if one of the transfer orders is perused, it would be clear that a person working at Pune is being transferred to Howrah (West Bengal). Similar transfer orders are issued to all other respondents- workmen transferring them out of Maharashtra. According to Mr.Talsania, the intention behind transferring respondents out of Maharashtra is to pressurise them to resign from their job.

18. Mr.Talsania submits that the effect of the transfer orders is that the respondents- workmen are being made to work with the independent employers with whom they have no privity of contract. It has effect of changing employer and, consequently, service conditions, which were never contemplated in the contract of employment.

19. Mr.Talsania further submits that so far as the compromise arrived at before the Supreme Court is concerned, it would bind only to those persons who are parties to the said compromise. That by no stretch of imagination it can be said to be an order of the Apex Court laying down any law or permitting the employer to transfer any of its employees who are not parties to the compromise.

20. Mr.Talsania further submits that the petitioner- employer in the past, right from the inception of the company, did not effect transfer of any of its employees in this manner. No employee was ever transferred to the dealer or its depots, till the impugned transfer orders were issued. In his submission, such transfers are not

permissible in law. He placed reliance on the judgments of the Apex Court in the case of **Kundan Sugar Mills vs. Ziyauddin, AIR 1960 SC 650** to contend that transfer of employee to a new concern cannot be an implied condition of service.

21. Mr.Talsania further submits that the specific averments are made by the respondents-workmen, in their complaint, that the workers through contractors are being engaged to get done shop floor work and that these allegations have not been denied by the petitioner- employer before the Industrial Court. Absence of specific denial constituted an admission on the part of the employer. With the result, the Industrial Court was perfectly justified in relying upon the absence of denial resulting in admission on the part of the employer, so as to draw an inference of availability of work for these respondents.

22. Mr.Talsania, lastly, submits that this petition is directed against the interim order. The view taken by the Court below is based on the prima facie; material available on record finding

balance of convenience in favour of respondents-workmen; who are bound to suffer greater injury in the event they are compelled to accept transfer orders. He, thus, submits that the view taken by the Court below in the impugned order is a reasonable and possible view. This Court not being a court of appeal should not substitute its own view unless the view taken by the Court below is found to be perverse, which in his submission, the petitioner- employer could not demonstrate. He, thus, prayed for dismissal of the petition with costs.

Consideration :

23. Having heard rival parties, without going into the niceties of the legal submissions advanced and without expressing any opinion on the merits of the matter, since substantive complainant is still pending; I only propose to examine as to whether or not the view taken by the Court below is a reasonable and possible view based on evidence on record, and whether any extraneous consideration or perversity has crept in the impugned order warranting interference of

this Court in exercise of writ jurisdiction powers under Article 226 of the Constitution of India.

24. Before considering the allegations, counter allegations and legality of the impugned order, it would be necessary to consider jurisdiction of the Courts in interfering with the orders of transfer of the employees by the employers emerging from the various cases cited at the bar. It cannot be disputed that the employer has right to transfer its employee. An employee accepts employment fully knowing that he is liable to be transferred from one place to other for administrative reasons and in the interest of the employer. This is one of the conditions of service. No employee can demur or cavil at an order of transfer. It is only when an order of transfer is made otherwise than for no administrative reasons and in the circumstances amounting to punishment or with mala fide intentions, that the transfer order gets exposed to challenge.

25. As already stated, an employee, normally, cannot complain about his transfer in Court. In

deciding the question as to what was the motive operating in the mind of the employer while passing the order of transfer, one has to look into the circumstances under which the order of transfer was passed. If the dominant motive of the employer was to punish the employee, the transfer is bad. If it was to ensure efficiency in administration, the transfer has to stand.

26. If the order is really intended as a punishment, though apparently innocuous, it will be open to the Court to consider whether the order is vitiated either by mala fides or by non-compliance of the principles of natural justice, if attracted.

27. The right to transfer an employee is a powerful weapon in the hands of the employer. Sometimes it is more dangerous than other punishments. Recent history bears testimony to this. It may, at times, bear the mask of innocuousness. What is ostensible in a transfer order may not be the real object. Behind the mask of innocence may hide sweet revenge, a desire to

get rid of an inconvenient employee or to keep at bay an activist or a stormy petrel. When the Court is altered, the Court has necessarily to tear the veil of deceptive innocuousness and see what exactly motivated the transfer. Any Court is expected to get satisfied that the real object of transfer is not what is apparent, examine what exactly was behind the transfer.

28. The Court below, in the case at hand, after tearing the veil of deceptive innocuousness of the orders of transfer has recorded prima facie findings reproduced hereinbelow:

> (a) That the respondents- workmen (complainants) were not parties to the Civil Appeal disposed of by the Apex Court; wherein a compromise between the parties was recorded, as such the terms of the said compromise were and are not binding on the respondents- workmen. The transfer of the workmen on the said cause appears to be mala fide.
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> (b) That various litigations between

the parties are pending in various Courts. One of such dispute is subjudice before the High Court. Attempt to effect transfers of employees constitutes an act of malice on the part of the employer.

(c) That the defence of the petitioner- employer that there is no work to provide to the respondents- workmen is contrary to the conduct of the employer in light of the fact that the employer has been employing labours through contractors. This conduct of the employer demonstrates an intention of the employer not to obey orders passed by the Court. It amounts to mala fides on the part of the employer.

(d) That the transfers of the respondents- workmen to the various dealers, depots and/or various independent establishments spread all over India amounts to change in service conditions of the workmen, prima facie; attracting item 9 of Schedule IV of the MRTU & PULP Act.

29. This Court while exercising writ jurisdiction is not expected to exercise appellate jurisdiction. This Court in order to sustain the impugned order has only to find out as to whether prima facie case has been made out by the respondents- workmen under the MRTU & PULP Act; that balance of convenience lies in their favour; and that if no interim relief is granted, then, who is likely to suffer suffer more injury and mischief.

30. While considering rival submissions, it is necessary to keep in view the well established rule that the burden of establishing mala fides lies very heavily on the person who alleges it. But the question here is: whether the transfer orders are made in the exigency of the management.

31. The Apex Court. in the case of **Kedar Nath v. State of Punjab** (1979 All Serv.L.J. 105) has said in a case of allegation of mala fides that the applicant has to prove malus animus indicating that the action was actuated either by spite or

ill will against him or by indirect or improper motives.

32. The Apex Court in the case of **Pratap Singh v. State of Punjab** (AIR 1964 SC 72) which is referred to in **Kedar Nath's case** (cited supra), has said that when a Court is satisfied that there is an abuse or misuse of power and its jurisdiction is invoked the Court can certainly step in.

33. Considered from various angles, it would not be out of place to mention that each and every finding recorded by the Court below is based on material available on record. The Court below is justified in saying that the petitioner- employer was not justified in assuming right to transfer its employees to altogether a new establishment. The Court below was also justified in holding that the compromise arrived at before the Apex Court was not binding on the respondents- workmen. Therefore, there was no question of such right being recognised by the Apex Court in favour of the petitioner- employer. That no such law has been laid down by the Apex Court. The Apex Court

has only accepted the term of compromise in question, which can only bind the parties to it. Hence, prima facie, the right of transfer assumed by the petitioner- employer is nothing but a colourable exercise of power. Hence malice on the part of the petitioner- employer was rightly found by the Court below.

34. The Court below is also justified in drawing an inference from the absence of denial to the allegations made in para- 3(8) of the complaint that the workers are being employed by the petitioner- employer through contractors to get the work done, as such reason sought to be given by the employer that it has no work to provide to the respondents- workmen constitutes malafides on the part of the petitioner- employer.

35. The Court below was also justified in, prima facie; observing that the dealers are independent entities in the eye of law. They cannot be said to be a part of the establishment of the petitioner company. Such transfers would amount to change in service conditions. The respondents- workmen have raised number of

important questions which need adjudication, such as: Whether the petitioner- employer has power to transfer its employees to altogether a new employer or establishment which was never contemplated when the Master and Servant relationship was established. Whether one can dream at the time when Master and Servant relationship was conceived that he would be transferred to an establishment which was and is never a part of the employer's establishment. Whether any privity of contract in this behalf can be inferred between the parties to the complaint. All these questions are serious question raised in the complaint warranting adjudication thereof in the light of the Apex Court judgment in the case of **Kundan Sugar Mills** (supra), which is some what near to the facts of the present case; wherein Their Lordships observed as under:

> " We have referred to the decisions only to distinguish them from the present case, and not to express our opinion as to the correctness of the decisions therein. It would be enough to point out that in all the said decisions the workers had been employed in a business or a concern and the question that arose was whether in the circumstances of each case the transfer from one branch to another was valid or amounted to victimization. None of these decisions deals with a case similar to that presented in this appeal, namely,

> whether a person employed in a factory can be transferred to some other independent concern started by the same employer at a stage subsequent to the date of his employment. None of these cases holds, as it is suggested by the learned counsel for the appellant, that every employer has the inherent right to transfer his employee to another place where he chooses to start a business subsequent to the date of the employment. We, therefore, hold that it was not a condition of service of employment of the respondents either express or implied that the employer has the right to transfer them to a new concern started by him subsequent to the date of their employment."

36. Having examined the findings of the Court below in the light of the material available on record, in the facts and circumstances of the case, one has to reach to the conclusion that the respondents- workmen did establish prima facie case for grant of interim relief. What do you mean by "prima facie case" is laid down by the Apex Court in the case **Martin Burn v. R.N.Banerjee**, AIR 1958 SC 79 in the following words:

> " The Labour Appellate Tribunal had to determine on these materials whether a prima facie case had been made out by the appellant for the termination of the respondent's service. A prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed.

> While determining whether a prima facie case had been made out the relevant consideration is whether on the evidence led it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on that evidence. It may be that the Tribunal considering this question may itself have arrived at a different conclusion. It has, however, not to substitute its own judgment for the judgment in question. It has only got to consider whether the view taken is a possible view on the evidence on the record."

37. The respondents- workmen have, thus, established prima facie case i.e. case for enquiry. They have also demonstrated balance of convenience in their favour and that they would suffer injury which can never be compensated in terms of money. The respondents- workmen have also demonstrated, prima facie; that the power of transfer has not been exercised for achieving efficiency in administration or for other administrative reasons and in the interest of the employer, but the same has been used for extraneous purpose with ill motive.

38. Having said so, let me turn to the certiorari jurisdiction of this Court. In the case of **Vishnu Kamath v. Ahmed Ishaque**, AIR 1955

SC 233, the Apex Court made following observations in regard to issuance of writ of certiorari under Articles 226 and 227 of the Constitution:

> "(1) 'Certiorari' will be issued for correcting errors of jurisdiction, as and when an inferior Court or Tribunal acts without jurisdiction or in excess of it, or fails to exercise it.
>
> (2) 'Certiorari' will also be issued when the Court or Tribunal acts illegally in the exercise of its undoubted jurisdiction, as when it decides without giving an opportunity to the parties to be heard, or violates the principles of natural justice.
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> (3) The Court issuing a writ of 'certiorari' acts in exercise of a supervisory and not appellate jurisdiction. One consequence of this is that the court will not review findings of fact reached by the inferior Court or Tribunal, even if they be erroneous. This is on the principle that a Court which has jurisdiction over a subject-matter has jurisdiction to decide wrong as well as right, and when the Legislature does not choose to confer a right of appeal against that decision, it would be defeating its purpose and policy, if a superior Court were to re-hear the case on the evidence, and substitute its own findings in 'certiorari'. These propositions are well settled and are not in dispute."

39. In the case of **Waryam Singh v. Amarnath**, AIR 1954 SC 215, the Apex Court observed as under:

> "An error in the decision or determination

> itself may also be amenable to a writ of 'certiorari' but it must be a 'manifest error apparent on the face of the proceedings', e.g., when it is based on clear ignorance or disregard of the provisions of law. In other words, it is a patent error which can be corrected by 'certiorari' but not a mere wrong decision."

40. In the case of **Mohd. Yunus v. Mohd. Mustakin**, AIR 1984 SC 38, the Apex Court ruled that where the High Court is called upon to correct an error of fact or law as an appellate Court or Tribunal, it will not review or reweigh the evidence upon which the determination of the inferior Court or Tribunal purports to be vested or to correct errors of law in the decisions.

41. In the backdrop of the above discussion, let me turn to the question of scope of appellate jurisdiction of the Court while considering appeals arising out of the interim orders of the subordinate Courts; wherein discretionary power of the trial Court plays its own role. While referring to the cases on this issue, I am conscious of the fact that this Court is exercising certiorari jurisdiction and not appellate jurisdiction. As a matter of fact,

certiorari jurisdiction cannot be wider than the appellate jurisdiction. If the appellate jurisdiction of the Court against the interim order is circumscribed by the well known restrictions of law, then while exercising certiorari jurisdiction this Court cannot ignore all those well recognised restrictions. In this behalf, I may profitably refer to the judgment of the Apex Court in the case of **Wander Ltd. v. Antox India P.Ltd.**, 1990 (Supp) SCC 727; wherein it was observed as under:

> " The appellate Court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunction. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion."

42. Having considered the impugned order in the light of the findings recorded by the Court below, having examined the same on the touchstone of the certiorari jurisdiction of this Court, keeping in mind the material and circumstantial evidence available on record, I am of the confirmed view that the view taken by the Court below is a reasonable and possible view and by no standard it can be said to be a perverse view warranting inference in hands of this Court under its writ jurisdiction.

43. It is well known principle of our law that any power conferred by Statute or regulation on an executive or administrative authority or assumed by the employer must be exercised in good faith for the purpose for which it is granted. It must not be misused or abused by being applied to an ulterior purpose. Whether that principle applies here or not, I do not say : all I do say is that if the complainants allege, as they do, that this was a misuse of the power of transfer that it was used, not for the purpose of good administration and efficiency but for the motive or punishment they have an arguable case which they are entitled

to have tried by the Court below.

44. All observations made herein are prima facie. The Industrial Court shall decide the complaint on its own merits based on evidence uninfluenced by the observations made herein. the Industrial Court is further directed to decide the complaint in question as expeditiously as possible, at any rate, within six months from the date of receipt of copy of this order. All rival contentions on merits are kept open.

45. In the result, petition is dismissed. Rule stands discharged with no order as to costs.

(V.C. DAGA, J.)